No. 122486

IN THE SUPREME COURT OF ILLINOIS

BARBARA MONSON, Plaintiff/Appellant, v. CITY OF DANVILLE, a Home Rule Municipality, Defendant/Appellee.	)	On Appeal from the Decision of the Appellate Court of Illinois, Fourth Judicial District No. 4-16-0593 There heard on appeal from the Court of the Fifth Judicial Circuit, Vermilion County, Illinois No. 13 L 71 Honorable Nancy S. Fahey Judge Presiding

BRIEF AND ARGUMENT OF DEFENDANT/APPELLEE CITY OF DANVILLE

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	)	**the Appellate Court of Illinois,**
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	)	
v.	)	**No. 4-16-0593**
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	)	**Vermilion County, Illinois**
Defendant/Appellee.	)	
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	)	
	)	**Honorable Nancy S. Fahey**
	)	**Judge Presiding**

BRIEF AND ARGUMENT OF DEFENDANT/APPELLEE CITY OF DANVILLE

NATURE OF THE CASE

Plaintiff Barbara Monson ("Plaintiff") filed this action against Defendant the City of Danville ("the City") seeking damages for its alleged negligence and willful conduct relating to a December 7, 2012 incident, during which she tripped on an uneven seam between adjoining slabs of concrete on a sidewalk and fell. Among other contentions, Plaintiff argued that the subject sidewalk deviation was an unreasonably dangerous condition and that the City was negligent and willful and wanton in failing to properly maintain the sidewalk and repair it. The trial court awarded summary judgment to the City, finding that the City's decision not to repair the sidewalk deviation was a discretionary policy determination immunized under Sections 2-109 and 2-201 of the Local

Governmental and Governmental Employee Tort Immunity Act, 745 ILCS 10/2-109, 10/2-201 ("the Tort Immunity Act"). Plaintiff appealed that ruling.

On appeal, the Appellate Court affirmed the trial court's summary judgment order in the City's favor. Specifically, the Appellate Court determined that no genuine issue of material fact existed that the City was immune from liability against Plaintiff's negligence and willful and wanton conduct claims under Sections 2-109 and 2-201 of the Tort Immunity Act. In doing so, the Appellate Court rejected Plaintiff's contentions that her claims arose from the Village's ministerial – and not discretionary – failure to maintain its sidewalk and were governed exclusively by Section 3-102 of the Tort Immunity Act.

The Appellate Court also dismissed Plaintiff's related averment that Sections 2-109 and 2-201 of the Tort Immunity Act did not apply because Section 3-102 supersedes them as a matter of statutory construction. In that regard, the Appellate Court ruled that Sections 2-109 and 2-201 of the Tort Immunity Act on the one hand, and Section 3-102 of the Tort Immunity Act on the other hand, pertain to factual scenarios that are mutually exclusive. Plaintiff did not submit a petition for rehearing to the Appellate Court. This Court accepted Plaintiff's timely filed petition for leave to appeal.

No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether summary judgment in the City's favor is warranted when the City is entitled to immunity pursuant to Sections 2-109 and 2-201 of the Tort Immunity Act for its discretionary policy decision not to undertake repairs to the portion of the sidewalk in question?

II. Whether summary judgment in the City's favor is warranted when the evidence of record establishes the height differential amid the adjoining slabs of concrete as being between one inch and one and one half inches and there are no aggravating circumstances preventing the application of the *de minimis* rule?

JURISDICTIONAL STATEMENT

Plaintiff's jurisdictional statement is accurate, but not complete. On July 20, 2016, the trial court granted the City's motion for summary judgment. (R. Vol. I, C 5-6). Plaintiff timely filed her notice of appeal on August 15, 2016. (R. Vol. II, C 328). The Appellate Court affirmed the trial court's entry of summary judgment for the City via an unpublished order released on May 9, 2017. On May 15, 2017, the City filed a motion to publish the Appellate Court's May 9, 2017 order, which was granted on June 15, 2017. The Appellate Court withdrew its unpublished order and issued a published opinion in the case that same day. No petition for rehearing was filed.

On July 19, 2017, Plaintiff timely filed her petition for leave to appeal to this Court. On September 27, 2017, this Court allowed Plaintiff's petition for leave to appeal. This Court has jurisdiction over this appeal pursuant to Supreme Court Rule 315, governing appeals from the Appellate Court to this Court.

STATEMENT OF FACTS

Because Plaintiff's Statement of Facts is argumentative, contains misrepresentations of fact and omits other relevant facts, the City provides this Court with this Statement of Facts.

On December 7, 2012, Plaintiff tripped and fell on a sidewalk located at and/or near the intersection of North Vermilion Street and East North Street in the City's downtown

commercial district. (R. Vol. I, C 7-8, 129-130). On December 2, 2013, Plaintiff filed a negligence and willful and wanton misconduct action against the City for personal injuries she allegedly sustained because of that incident. (R. Vol. I, C 7-13). Plaintiff's complaint alleged that she suffered injuries due to the City's failure to maintain the sidewalk in a safe condition. (R. Vol. I, C 9-12).

Plaintiff contended that the City negligently and/or willfully and wantonly failed to warn her about and/or repair an unreasonably dangerous condition in the said sidewalk namely, an uneven juncture of two concrete slabs. (R. Vol. I, C 9-12). Plaintiff's complaint also asserted that the City had actual and/or constructive notice of the sidewalk's purported dangerous condition owing to its employees having previously inspected the sidewalk juncture at issue. (R. Vol. I, C 8-9). Plaintiff's complaint further alleged that neither ice nor precipitation played a role in her accident. (R. Vol. I, C 8). Finally, Plaintiff contended that the City's alleged conduct in the foregoing respects proximately caused her to sustain injuries to her face, mouth, foot, shoulder, and arm, and incur damages. (R. Vol. I, C 10-12).

The City denied all the material allegations of Plaintiff's complaint, including that Plaintiff was injured as a direct and proximate result of any wrongful acts or omissions on its part. (R. Vol. I, C 27-32). Additionally, the City's answer included an affirmative defense that Plaintiff's own negligence was the proximate cause of the subject incident. (R. Vol. I, C 32-33). The City also alleged as an affirmative defense that it was not liable for Plaintiff's alleged injuries pursuant to Section 3-102 of the Tort Immunity Act, 745 ILCS 10/3-102. (R. Vol. I, C 34-35). In that regard, the City asserted that it lacked actual or

constructive notice that the condition of its sidewalk was not reasonably safe. (R. Vol. I, C 34-35).

The City's answer also raised affirmative defenses under Sections 2-109 and 2-201 of the Tort Immunity Act, 745 ILCS 10/2-109, 10/2-201. (R. Vol. I, C 35). The City contended that it engaged in discretionary policy decisions regarding the sidewalk juncture at issue such that it was shielded from any liability for the damages sustained by Plaintiff. (R. Vol. I, C 35). Plaintiff's reply denied those affirmative defenses.[1] (R. Vol. I, C 39-44). The parties thereafter engaged in written and oral discovery. As part of her written discovery responses, Plaintiff produced photographs of the uneven sidewalk seam in question that depict a height differential amid the adjoining slabs of concrete of between one inch and one and one half (1.5) inches. (R. Vol. I, C 187, 214-215, 222). The respective discovery depositions of the parties and other witnesses described the subject accident and other relevant circumstances as follows.

On December 7, 2012, Plaintiff embarked on a trip to the City's downtown commercial district. (R. Vol. I, C 129, at 7:18-24). Per Plaintiff, that area was not thriving, although it is lined with retail shops. (R. Vol. I, C 129, at 8:7-9; C 159, at 127:1-3). It had rained earlier in the day, but was a clear afternoon. (R. Vol. I, C 140, at 52:6-16). Plaintiff was familiar with the area, having grown up nearby. (R. Vol. I, C 129, at 7:11-16; C 139, at 48:19-22).

[1] Plaintiff submitted a motion to strike as concerned the City's Sections 2-109 and 2-201 discretionary immunity defense, among other affirmative defenses. (R. Vol. I, C 46-54). She averred that the City's Sections 2-109 and 2-201 immunity defense lacked factual support. (R. Vol. I, C 49). She further contended that discretionary immunity did not apply to claims involving the failure to maintain municipal property and that Section 3-102 of the Tort Immunity Act supplanted Section 2-201 of the Act. (R. Vol. I, C 49-51). The trial court reserved ruling on the motion to strike pending discovery. (R. Vol. I, C 4).

Plaintiff first visited a sewing store located at South Buchannan Street and situated several blocks to the east of the intersection of North Vermilion Street and East North Street where the subject incident occurred. (R. Vol. I, C 129, at 7:23-24, 8:1; C 130, at 12:2-5; C 139, at 48:1-5). Plaintiff thereafter at approximately 2:00 or 2:30 p.m. set out to visit a pawn shop located on North Vermilion Street. (R. Vol. I, C 139, at 47:19-22, 48:1-8; C 140, at 50:2-4; C 144, at 67:16-18). She drove her vehicle to the said location and parked at the first parallel spot available on the south side of East North Street just to the east of its intersection with North Vermilion Street. (R. Vol. I, C 139, at 48:16-18, 49:1-17; C 140, at 51:10-17; C 142, at 60:1-8, C 145, at 73:21-24; C 149, at 88:2-7).

Plaintiff then exited and walked around the rear of her car. (R. Vol. I, C 140, at 52:3-5). In lieu of using the handicap ramp at the intersection to access North Vermilion Street, Plaintiff stepped up onto a yellow painted curb located mere steps from the rear of her vehicle. (R. Vol. I, C 142, at 60:9-23). She thereafter proceeded to walk diagonally initially in a southwest direction before turning left and heading due south down North Vermilion Street toward the pawn shop. (R. Vol. I, C 140, at 51:18-23; C 143, at 64:4-17). Her path of travel was such that while walking diagonally in a southwest direction back toward the intersection of North Vermilion Street and East North Street from her car, she sauntered in between an antique light post and a corner building that housed Bratland's Prescription Shop. (R. Vol. I, C 131, at 14:20-22; C 143, at 63:19-24, 64:4-6). She did not notice any sidewalk deviation in the area at that time and walked to the pawn shop without incident. (R. Vol. I, C 140, at 52:19-23; C 143, at 64:7-20; C 145, at 73:12-15). Plaintiff spent less than five minutes there before endeavoring to return to her parked car. (R. Vol. I, C 140, at 53:1-2; C 143, at 64:21-23).

On the trip back to her car, Plaintiff took the exact same path that she had previously used to get to the pawn shop. (R. Vol. I, C 143, at 65:12-14). As such, she once again walked between the same antique light post and the corner building that housed Bratland's Prescription Shop. (R. Vol. I, C 143, at 65:15-24; C 144, at 66:1-16). It was at and/or around that spot that she encountered an uneven juncture of two sidewalk concrete slabs. (R. Vol. I, C 144, at 66:17-21, 68:2-4). Per Plaintiff, there was a "possibility" of pooled water in that area given the rain earlier in the day. (R. Vol. I, C 145, at 70:22-24; C 152, at 100:16-19). On this subject, Plaintiff testified, in relevant part:

> Q: Was there any pooling or puddling of water anywhere?
>
> Plaintiff: I believe so. That was a possibility.
>
> Q: Well, possibility is a guess. What I want to know is in your mind's eye, do you actually remember?
>
> Plaintiff: I remember it being wet. And I also remember that when I got to the hospital, they wanted to know why my clothes were wet.
>
> Q: Because it had been raining earlier that day but not raining at the time of the fall?
>
> Plaintiff: Correct.
>
> Q: But whether there were any pools or puddles of water on the sidewalk in the area where you fell, you don't know?
>
> Plaintiff: I would say there probably was because it is, you know, a low area.
>
> Q: What I am asking though, that is a guess saying probably. What I am asking is do you know for a fact that there was pools or puddles of water that day in the area where you fell?

Plaintiff: Yeah, there was. I mean, it is like –

Q: Okay. Can you specifically state where the pool or puddles that you are describing were?

Plaintiff: Right in this area (indicating).

Q: So, you are saying just to the, looking at Exhibit 4, just to the right of the light pole?

Plaintiff: Yeah. Probably like this. I don't know how much of depression is there, but –

Q: Can you state the depth of any sort of pool or puddle of water that you saw?

Plaintiff: Probably an inch or so.

* * *

Q: Your complaint in Paragraph 14 says the ground was clear and there was no precipitation or ice. Have you seen that allegation before in your complaint?

Plaintiff: I don't think so.

* * *

Q: But what you are saying here today is that is not true and there was precipitation, pooled water?

Plaintiff: Yeah, I would say there was some water there. It had rained that day so.

(R. Vol. I, C 145, at 70:22-24, 71:1-24, 72:1-4; C 152, at 100:9-19).

At the time of her accident, Plaintiff was looking directly in front of her. (R. Vol. I, C 144, at 69:6-9). She was not in any rush or distracted by her surroundings. (R. Vol. I, C 144, at 67:1-8; C 146, at 74:6-12). There was no vehicular traffic around her at the time. (R. Vol. I, C 152, at 100:1-4). She also has no recollection of any pedestrian traffic during her jaunt back to her car. (R. Vol. I, C 152, at 100:5-8).

The accident occurred just after Plaintiff had used a remote that she was carrying in hand to unlock her car doors. (R. Vol. I, C 142, at 59:1-3; C 146, at 75:21-24, 76:1-5). At that moment, Plaintiff had just passed the antique light post to her left. (R. Vol. I, C 144, at 66:2-21). She took two or three steps after unlocking her car doors with her vehicle in sight and then felt the toe of her left foot and/or shoe "hit something, the sidewalk." (R. Vol. I, C 144, at 68:2-4; C 146, at 75:24, 76:1-5). She then fell forward with her chin striking the ground. (R. Vol. I, C 146, at 76:10-15). Plaintiff does not know if another part of her body possibly struck the ground first. (R Vol. I, C 146, at 76:16-20). She landed with her arms tucked underneath her body. (R. Vol. I, C 154, at 108:2-14). Her head did not strike either her car or the yellow painted curb when she fell. (R. Vol. I, C 148, at 85:1-2; C 154, at 107:15-22). By Plaintiff's account, the antique light post was not within her grasp at the point at which her left foot and/or shoe got caught on the sidewalk and she fell. (R. Vol. I, C 144, at 66:17-21).

Plaintiff has no memory of picking herself up off the ground or getting into her car after her fall. (R. Vol. I, C 148, at 82:5-9). Once in her car, Plaintiff reached for her seatbelt and then realized that she could not move her left arm. (R. Vol. I, C 148, at 83:7-19). At that point, she called her husband for assistance. (R. Vol. I, C 148, at 83:7-19). Plaintiff's husband, who at the time was a City public works department foreman, came to the accident site, moved Plaintiff to the passenger seat in her vehicle and thereafter proceeded to drive her to emergency room at Provena United Samaritans Medical Center ("Provena") (n/k/a Presence United Samaritans Medical Center). (R. Vol. I, C 129, at 6:10-13; C 130, at 10:2-8, 12:14-16; C 132, at 18:4-7; C 148, at 85:15-20; C 149, at 86:1-24).

At Provena, Plaintiff was prescribed pain medication and instructed to follow up with an orthopedic surgeon. (R. Vol. I, C 149, at 88:22-23, 89:16-18). Plaintiff had surgery on her left shoulder less than one week later, on December 12, 2012. (R. Vol. I, C 150, at 91:16-17). After surgery, Plaintiff underwent occupational therapy, which included a home exercise regimen. (R. Vol. I, C 156, at 114:16-19; C 157, at 119:8-10). She also had dental work done in mid-January 2013, namely a crown to repair a broken back tooth and bonding to repair five chipped teeth. (R. Vol. I, C 150, at 93:16-17; C 155, at 110:8-24, 111:1-11; C 156, at 114:1-6).

Prior to her accident, Plaintiff never had any conversations with City personnel about the sidewalk juncture in question. (R. Vol. I, C 150, at 92:17-20). Plaintiff is unaware of any other citizens complaining to the City about the sidewalk condition in that area. (R. Vol. I, C 150, at 92:21-24). Plaintiff did recall observing City crews performing sidewalk work near the intersection of North Vermilion Street and East North Street either earlier in 2012 or possibly in 2011. (R. Vol. I, C 151, at 96:5-16).

At her deposition, Plaintiff was shown photographs of the alleged accident site. (R. Vol. I, C 142-145, 162-164). Plaintiff testified that her spouse took the subject photographs approximately six weeks after her accident. (R. Vol. I, C 145, at 70:6-12). Per Plaintiff, the photographs depict the area as it appeared on the day of her accident, save for the presence of snow mounds in all the photographs and the placement of a trash receptacle in her deposition Exhibit 3. (R. Vol. I, C 140, at 51:24, 52:1-2; C 143, at 62:16-20; C 144, at 67:19-24, 68:1; C 152, at 98:1-4). Plaintiff illustrated her path of travel at the time of her accident on her deposition Exhibit 4. (R. Vol. I, C 144, at 69:18-24; C 145, at 72:5-14).

At the time of Plaintiff's accident, Shelly Lawson ("Lawson") was the City's superintendent of downtown services. (R. Vol. I, C 172, at 25:1-8). In that capacity, Lawson's duties included beautification efforts such as landscaping and trash pick-up, snow removal and maintenance of the City's sidewalks and parking structures in the downtown commercial district. (R. Vol. I, C 174, at 30:5-24, 31:1-24; C 180, at 55:9-13; C 181, at 60:13-20). Lawson testified that any citizen complaints regarding sidewalks in that area are routed to her. (R. Vol. I, C 177, at 43:23-24, 44:1-9). She then starts a dialogue usually via e-mail relative to the complaint and otherwise documents any repair work undertaken with Cathy Courson ("Courson"), the City's risk manager. (R. Vol. I, C 177, at 44:10-18). Per Lawson, prior to Plaintiff's accident, she had not received any complaints about the area in question. (R. Vol. I, C 177, at 45:1-3).

Lawson testified that she learned about Plaintiff's accident directly after it occurred from a co-worker. (R. Vol. I, C 168, at 8:2-10; C 169, at 10:8-19). The co-worker had been in Lawson's office when he received a telephone call from Plaintiff's husband requesting assistance in regard to Plaintiff's accident. (R. Vol. I, C 168, at 8:2-10; C 169, at 10:8-19). Lawson thereafter spoke with Plaintiff's husband. (R. Vol. I, C 168, at 7:2-9; C 169, at 10:8-19). Per Lawson, that conversation occurred two or three days after Plaintiff's accident. (R. Vol. I, C 168, at 8:2-10). She could not recall if the discussion was in person or done via telephone. (R. Vol. I, C 168, at 7:7-12; C 169, at 12:6-9).

After the conversation, Lawson was left with the impression that Plaintiff had visited Bratland's Prescription Shop and fallen directly outside the pharmacy's entrance on North Vermilion Street. (R. Vol. I, C 169, at 11:2-9; C 170, at 14:16-23, 16:9-24; C 179, at 53:8-21). Lawson thereafter inspected the sidewalk in the front entryway of Bratland's

Prescription Shop and found no defects. (R. Vol. I, C 169, at 13:24; C 170, at 14:1-15). Lawson then had no dialogue with Courson regarding the incident. (R. Vol. I, C 171, at 18:11-21; C 178, at 46:1-7).

In the late spring or early summer of the following year (*i.e.*, 2013), Lawson accompanied Courson on a site inspection regarding an unrelated incident that occurred one block south of where Plaintiff's accident had happened. (R. Vol. I, C 170, at 15:11-24; C 171, at 18:6-10, 21:12-17). While out on the said site inspection, Courson commented to Lawson that she also wanted to then take pictures at the intersection of North Vermilion Street and East North Street. (R. Vol. I, C 170, at 15:15-24, 16:1-8; C 171, at 19:3-11). When Lawson inquired why, Courson remarked that Plaintiff had filed a lawsuit against the City in conjunction with her accident. (R. Vol. I, C 170, at 16:1-8). It was at that juncture that Lawson, while accompanying Courson, first visited Plaintiff's accident site. (R. Vol. I, C 170, at 16:1-8). While there, Lawson positioned a trash receptacle near the two uneven sidewalk concrete slabs. (R. Vol. I, C 172, at 22:11-24). She did that to ensure other pedestrians would not encounter the area. (R. Vol. I, C 172, at 24:6-9).

Lawson testified that in 2011 she relayed to City that some sidewalk concrete slabs in the downtown commercial district required repair. (R. Vol. I, C 174, at 31:3-6; C 175, at 34:12-18, 35:3-8). Lawson initially performed an inspection of the sidewalks and along the way spray painted the areas that she wanted fixed. (R. Vol. I, C 175, at 35:16-24, 36:1-7; C 181, at 61:5-10). Per Lawson, it was part of her job to flag the areas of the sidewalk that needed repair, but other City departments had to assist with effectuating the repairs. (R. Vol. I, C 175, at 34:12-24, 35:1-15).

Lawson's inspection focused on North Vermilion Street between East Main Street and East Harrison Street. (R. Vol. I, C 175, at 36:3-7). A City engineer thereafter accompanied Lawson on a second inspection of the sidewalks in the said area. (R. Vol. I, C 175, at 35:1-15). During that second inspection, the City engineer took measurements and he and Lawson discussed which concrete slabs needed to be repaired and/or removed. (R. Vol. I, C 175, at 35:1-24, 36:1-2). Finally, Lawson confirmed that sidewalk repair and/or replacement did occur close to the site of Plaintiff's accident. (R. Vol. I, C 181, at 61:5-16). To that end, she testified that the concrete slabs that were repaired and/or replaced as part of the project are visibly evident, as they appear different in color than the older, original concrete slabs. (R. Vol. I, C 181, at 61:5-16).

Doug Ahrens ("Ahrens") was the City's director of public works at the time of Plaintiff's accident. (R. Vol. I, C 185, at 6:14-22). Like Lawson, Ahrens testified that he was unaware of any citizen complaints or incidents prior to Plaintiff's accident concerning the sidewalks around the intersection of North Vermilion Street and East North Street. (R. Vol. I, C 191, at 32:10-13; C 196, at 52:16-18). Ahrens testified that he was the final decision maker concerning whether a concrete slab got repaired or replaced as part of the North Vermilion sidewalk repair project that was initiated a year prior to Plaintiff's accident. (R. Vol. I, C 188, at 20:1-5; C 200, at 68:22-24; C 201, at 69:1).

Ahrens attested to having used numerous factors to determine whether to repair or replace individual concrete slabs as part of that project, including the proximity of the slab to other obstructions such as buildings, light poles and trees, and any height deviations at issue. (R. Vol. I, C 187, at 15:1-24, 16:1-15; C 188, at 17:4-12; C 202, at 76:8-22). Per Ahrens, budget and available manpower also dictated what concrete slabs got repaired or

replaced under his final directives. (R. Vol. I, C 187, at 15:17-19, 16:12-15). The said factors were not memorialized in any City written policy, but instead were developed via Ahrens' discussions with other City personnel. (R. Vol. I, C 187, at 16:20-24; C 188, at 17:1-3). Further, Ahrens testified that there were no City policies or procedures related to sidewalk or street repairs. (R. Vol. I, C 191, at 32:4-9).

As concerned the positioning of a concrete slab relative to surrounding obstructions (*i.e.*, buildings, light poles and trees), Ahrens explained that the presence of such barriers typically resulted in less pedestrian traffic in those areas. (R. Vol. I, C 202, at 76:8-22). Per Ahrens, no single factor, including height deviation, dominated his final decision whether to repair or replace a concrete slab. (R. Vol. I, C 187, at 15:11-16; C 188, at 17:8-21). Rather, all the aforesaid factors were taken into consideration together in determining what work could be and ultimately got done. (R. Vol. I, C 187, at 15:11-16; C 188, at 17:8-21).

As concerned the budget for the North Vermilion sidewalk repair project, Ahrens attested that the project was funded from a line item in the City's streets division budget. (R. Vol. I, C 189, at 23:2-3). Per Ahrens, the budget for the project was between $20,000 and $30,000. (R. Vol. I, C 197, at 56:4-10; C 202, at 73:7-12). He also testified that some of the earmarked funds had to be used for planned maintenance projects outside the North Vermilion sidewalk repair project's radius. (R. Vol. I, C 197, at 56:4-10). Hence, the work had to be prioritized. (R. Vol. I, C 202, at 74:4-7). Ahrens had to rank which concrete slabs were most in need of repair and budget was a constant concern. (R. Vol. I, C 202, at 73:7-24, 74:1-11).

According to Ahrens, Lawson and Tim Cohen ("Cohen"), the City's engineer, made recommendations to him concerning sidewalk slabs that needed repair or

replacement. (R. Vol. I, C 189, at 24:9-21; C 190, at 25:3-12). Per Ahrens, he dispatched Lawson and Cohen to perform initial inspections and/or a walk-through to accomplish that task. (R. Vol. I, C 189, at 24:9-21; C 190, at 25:3-17; C 196, at 49:9-12; C 203, at 78:14-24, 79:1-3). Ahrens later did a walk-through of the area with Lawson and Cohen, observing all the sidewalks that encompassed the project as well as the areas Lawson and Cohen had spray painted for repair or replacement. (R. Vol. I, C 190, at 25:18-24, 26:1-9; C 193, at 39:14-16; C 195, at 48:15-23; C 197, at 55:1-16; C 200, at 65:1-24, 66:1-8; C 202, at 75:17-21; C 203, at 77:8-20). He did so in order to discern in his judgment whether the areas Lawson and Cohen had designated were appropriate for work. (R. Vol. I, C 200, at 66:4-8, 68:18-21).

During his walk-through, Ahrens discussed with Lawson and Cohen the concrete slabs that would and would not be repaired and/or replaced. (R. Vol. I, C 188, at 19:6-24, 20:1-5). For his part, Ahrens added concrete slabs for repair or replacement that Lawson and Cohen had not previously marked with spray paint. (R. Vol. I, C 202, at 76:2-4). He also removed concrete slabs that Lawson and Cohen had designated to be part of the project. (R. Vol. I, C 194, at 43:2-21; C 203, at 78:3-5). Ahrens also recollected discussing the budget for the project with Lawson and Cohen during his walk-through. (R. Vol. I, C 197, at 56:11-17). Conversations concerning the cost of repair and/or replacement of concrete slabs per square foot were then had between Ahrens, Lawson and Cohen. (R. Vol. I, C 197, at 56:11-17). Ahrens' inspection took up approximately one-half to two-thirds of his work day. (R. Vol. I, C 196, at 49:17-21; C 199, at 64:1-11).

Ahrens testified that he inspected every slab of concrete in the area encompassed by the project, including the two uneven, adjoining slabs of concrete on which Plaintiff

tripped and fell. (R. Vol. I, C 186, at 10:24, 11:1-4; C 190, at 26:2-20; C 192, at 33:16-21; C 203, at 77:8-16). On that subject, Ahrens testified, in relevant part:

Q: Do you specifically recall as you sit here today looking at this particular area of concrete?

* * *

Q: The particular slab of concrete that Mrs. Monson fell on.

Ahrens: I believe I looked at it. Do I recall the date and time that I looked at it, no.

* * *

Q: I am assuming that based upon what you have just told me that as you were doing your walk-through of the downtown area, you didn't stop to measure every deviation, correct?

Ahrens: That is correct.

Q: And in terms of the particular slab of concrete that we are here to talk about today, you don't have any recollection of whether or not you measured that deviation?

Ahrens: That is correct.

Q: In fact, you don't know if as you sit here today, whether or not you even considered the slab of concrete for repair, correct?

Ahrens: I believe we did consider the slab of concrete because we looked at every slab of concrete.

Q: So would it be fair to say then that every slab of concrete within the two block area of the Vermilion Street project was considered for repair?

Ahrens: Was evaluated as whether it needed repair or would be included in the repairs.

* * *

Q: What I will mark as your Exhibit 4 which was also Barbara Monson's Exhibit 4, this is a photograph that Mrs. Monson marked in terms of her travel of path on that day. Do you understand that now?

Ahrens: Yes.

Q: And do you believe that there is no doubt that you would have, this area depicted on this photograph would have been part of your inspection in the fall of 2011?

Ahrens: Yes. I believe that it was and that it would have been.

* * *

Q: And in terms of I know you said before you don't know specifically which direction your inspection started at, but in your inspection process, you would have looked at all angles of a particular area?

Ahrens: Yes.

Q: In other words, you wouldn't just make one pass through it and make a decision while walking that that should be done or that should not be done?

Ahrens: No. Generally, we would walk a portion, stop, discuss that general area and then evaluate it and then move on to the next.

Q: And that process that you just described you believe would have applied to the area depicted on your Exhibit 4 as well?

Ahrens: Yes.

* * *

Q: You were asked some questions earlier about whether or not you believe something was done or something like that. We have already

established here today whether or not you believe something was done, you don't have any personal knowledge as you sit here today whether or not something was or was not done on a particular day back when you were doing this walk-through, correct?

Ahrens: Whether something was particularly was done or not done?

Q: Was looked at or was not looked at. You can't sit here today and tell me, Miranda, I looked at this particular area and this is how I looked at it?

Ahrens: I can tell you that I looked at that area. From which direction I approached it, I do not recall.

(R. Vol. I, C 188, at 18:18-24, 19:1-2; C 196, at 50:10-24, 51:1-5; C 201, at 71:19-24, 72:1-24, 73:1-6; C 202, at 74:16-24, 75:1-7).

At his deposition, Ahrens was also shown a photograph designated as his deposition Exhibit 1. (R. Vol. I, C 200, at 65:1-5; C 205). Per Ahrens, the subject photograph depicts an area on the north side of Bratland's Pharmacy Shop (*i.e.*, along the south side of East North Street). (R. Vol. I, C 200, at 65:1-8; C 205). Ahrens further attested that Plaintiff's accident would have happened just west of the perspective of the camera (*i.e.*, at the bottom of the photograph). (R. Vol. I, C 200, at 65:9-15; C 205). Ahrens confirmed that the photograph shows red or pink lines on the concrete on the north side of Bratland's Pharmacy Shop. (R. Vol. I, C 200, at 65:16-19; C 205). Per Ahrens, the said painted lines designate areas of concrete that were removed or replaced as part of the sidewalk repair project. (R. Vol. I, C 200, at 65:16-23; C 205).

According to Ahrens, the sidewalk slabs depicted in his deposition Exhibit 1 were inspected as part of his walk-through. (R. Vol. I, C 200, at 66:9-13; C 205). Part of that

inspection included evaluating that site for a landscaping bed. (R. Vol. I, C 201, at 69:2-24, 70:1-12). Ultimately, it was determined that no landscaping bed would be installed on the north side of Bratland's Pharmacy Shop and instead the concrete slabs at that location were replaced. (R. Vol. I, C 199, at 64:11-14; C 201, at 69:2-24, 70:1-12).

Ahrens testified that the North Vermilion sidewalk repair project was completed in late 2011 or early 2012 (*i.e.*, the fall/winter season), save for certain slab jacking work. (R. Vol. I, C 189, at 22:1-3; C 199, at 61:10-15). Ahrens explained that slab jacking involves injecting high pressure concrete under an existing slab to raise it up. (R. Vol. I, C 203, at 79:9-12). Per Ahrens, the City does not perform slab jacking work, but retains an outside contractor for such jobs. (R. Vol. I, C 197, at 53:21-24, 54:1-6; C 203, at 79:13-14). Ahrens testified that the area depicting where Plaintiff fell in his deposition Exhibit 4 was not eligible for slab jacking because of the presence of an electrical hand hole in one of the adjacent concrete slabs. (R. Vol. I, C 203, at 79:19-24, 80:1-13; C 208). By Ahrens' account, the hand hole is a cavity that houses electrical components for the nearby antique light fixture. (R. Vol. I, C 203, at 80:14-23). Ahrens testified that if slab jacking were done in that location, the pressurized concrete would likely fill the electrical component cavity, as opposed to raising the concrete slab. (R. Vol. I, C 203, at 79:19-24, 80:14-24; C 204, at 81:1-5).

Following discovery, on March 23, 2016, the City moved for summary judgment invoking Sections 2-201 and 2-109 of the Tort Immunity Act. (R. Vol. I, C 106-118). Specifically, the City submitted that the decision Ahrens made not to repair the sidewalk juncture in question was a discretionary policy determination immunized under Section 2-201 of the Act. (R. Vol. I, C 109-114). In its motion, the City touted case law in which

courts had applied Section 2-201 immunity to a municipality's omission of sidewalk repair namely, *Richter v. College of DuPage*, 2013 IL App (2d) 130095. (R. Vol. I, C 109-114).

Alternatively, the City contended that summary judgment in its favor was warranted because the uneven seam between the adjoining slabs of concrete was *de minimis*. (R. Vol. I, C 115-116). In support of that argument, the City noted that the photographs produced by Plaintiff revealed that the height variation between the two concrete slabs at issue was between one inch and one and one half inches. (R. Vol. I, C 115-116, 214-215, 222). Further in the alternative, the City urged that it was entitled to summary judgment because it owed Plaintiff no duty to remedy the obvious risk created by the said alleged defect. (R. Vol. I, C 116-117).

Plaintiff filed her response to the City's motion for summary judgment on April 22, 2016. (R. Vol. I, C 228-245). In that response, Plaintiff urged that Section 3-102 of the Tort Immunity Act negated Section 2-201 of the Act. (R. Vol. I, C 233-237). She contended that both the prefatory language of Section 2-201 and *Murray v. Chicago Youth Ctr.*, (2007), 224 Ill. 2d 213, among other authorities, corroborated her position in that regard. (R. Vol. I, C 233-237). In particular, Plaintiff asserted that the "except as otherwise provided" prefatory clause in Section 2-201 meant that discretionary immunity can never apply in cases that implicate a municipality's Section 3-102 duty to keep its property in a reasonably safe condition such as trip-and-falls on sidewalks. (R. Vol. I, C 233-237). To that end, Plaintiff maintained *Richter* was wrongly decided and conflicted with *Murray*. (R. Vol. I, C 236).

Relatedly, Plaintiff suggested that maintaining and/or repairing government property is always a ministerial function, and can never be a discretionary function to which

Section 2-201 of the Tort Immunity Act can apply. (R. Vol. I, C 237-239). Alternatively, Plaintiff averred that a question of fact existed relative to whether the maintenance of the City sidewalk at issue was discretionary. (R. Vol. I, C 239-240). Specifically, she questioned whether Ahrens had made a discretionary policy determination not to repair the sidewalk slabs in question. (R. Vol. I, C 239-240). To that end, she highlighted portions of Ahrens' deposition testimony and maintained that he purportedly did not have a specific recollection of evaluating for repair that portion of sidewalk on which she fell. (R. Vol. I, C 229-231). Finally, Plaintiff also argued that the condition upon which she fell was not open and obvious or *de minimis*. (R. Vol. I, C 240-245).

On June 15, 2016, the City filed a reply in further support of its summary judgment motion. (R. Vol. II, C 319-326). In its reply, the City reiterated that Plaintiff's claim targeted discretionary governmental acts or omissions protected by Section 2-201 immunity. (R. Vol. II, C 319-322). Again, citing *Richter*, the City maintained that there was nothing unique about a case involving an act or omission in the context of municipal sidewalk repair that placed it beyond the purview of Section 2-201 of the Act so long as the requirements for applying the said immunity were satisfied. (R. Vol. II, C 319-322). The City further maintained that Plaintiff's averments that Section 3-102 of the Tort Immunity Act trumped Section 2-201 of the Act were predicated on a tortured construction of the Act. (R. Vol. II, C 322-323).

In that regard, the City highlighted that Section 3-102 of the Act speaks to the duty of a municipality to maintain its property in a reasonably safe condition and urged that the existence of a duty did not automatically render a valid immunity inapplicable, as Plaintiff proclaimed. (R. Vol. II, C 322-323). The City further averred that whether a local public

entity owes a duty of care and whether that entity enjoys immunity are separate and distinct issues. (R. Vol. II, C 322-323). Additionally, the City maintained that Sections 3-102 and 2-201 of the Act cover different, incongruous subjects – the former concerns ministerial functions and the latter applies to discretionary policy determinations. (R. Vol. II, C 323). The City further denied that a material question of fact existed concerning whether Ahrens made a discretionary policy determination not to repair the sidewalk slabs at issue. (R. Vol. II, C 321-322). Finally, the City repeated its earlier averments that the alleged defect was *de minimis* and/or an open and obvious condition from which it had no duty to protect Plaintiff. (R. Vol. II, C 324-326).

On July 12, 2016, the trial court entertained oral argument relative to the City's summary judgment motion. (R. Vol. III, P 2-21). At the hearing's conclusion, the trial court took the motion under advisement. (R. Vol. III, P 12, 20). On July 20, 2016, the trial court via a docket entry granted the City's summary judgment motion, finding that the omissions complained of by Plaintiff relative to the City's investigation of and decision not to repair the uneven sidewalk seam was a discretionary policy determination and could not be classified as ministerial. (R. Vol. I, C 5-6). In so ruling, the trial court noted that it was relying heavily on *Richter*. (R. Vol. I, C 5-6).

Plaintiff filed her notice of appeal on August 15, 2016. (R. Vol. II, C 328). The arguments of the parties before the Appellate Court mirrored those they made to the trial court. The Appellate Court affirmed the trial court's entry of summary judgment for the City on Section 2-201 immunity grounds via an unpublished order released on May 9, 2017. On June 15, 2017, the Appellate Court withdrew its May 9, 2017 unpublished order and issued a published opinion in the case on the City's motion. On July 19, 2017, Plaintiff

timely filed her petition for leave to appeal to this Court. On September 27, 2017, this Court allowed Plaintiff's petition for leave to appeal.

ARGUMENT

I. SUMMARY JUDGMENT IN THE CITY'S FAVOR IS WARRANTED BECAUSE THE CITY IS ENTITLED TO IMMUNITY PURSUANT TO SECTIONS 2-109 AND 2-201 OF THE TORT IMMUNITY ACT FOR ITS DISCRETIONARY POLICY DECISION NOT TO UNDERTAKE REPAIRS TO THE PORTION OF THE SIDEWALK IN QUESTION.

A. Standard of review

Summary judgment is proper where the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (2016); *Dowd & Dowd v. Gleason*, (1998), 181 Ill. 2d 460, 483. When a plaintiff fails to establish any element of an asserted cause of action, summary judgment for the defendant is warranted. *Bagent v. Blessing Care Corp.*, (2007), 224 Ill. 2d 154, 163. Summary judgment also is warranted when a defendant is immune from liability under the Tort Immunity Act. *Barnett v. Zion Park Dist.*, (1996), 171 Ill. 2d 378, 385.

Whether summary judgment is appropriate is a matter that this Court reviews *de novo*. *Roth v. Opiela*, (2004), 211 Ill. 2d 536, 542. Further, in as much as the instant appeal involves interpreting various provisions of the Tort Immunity Act, a *de novo* standard of review applies. *Albert v. Bd. of Educ. of City of Chicago*, 2014 IL App (1st) 123544, ¶ 30. Additionally, this Court can affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower courts relied upon that ground. *Home Ins. Co. v. Cincinnati Ins. Co.*, (2004), 213 Ill. 2d 307, 315.

B. Neither strict statutory construction nor the discretionary/ministerial analysis renders Section 2-201 inapplicable in this case.

Plaintiff outlines two paths by which this Court can purportedly find that Section 2-201 discretionary immunity is inapposite to her instant claims. First, she asserts that under a strict statutory interpretation analysis, the introductory clauses of Section 3-102 and Section 2-201 make plain that the former provision trumps the latter. Alternatively, Plaintiff urges that the discretionary/ministerial analysis likewise results in Section 2-201 being inapplicable here. She is wrong. Respectfully, both aforesaid paths lead to dead ends for Plaintiff and do not at all expose error on the Appellate Court's (or the trial court's) part.

In advocating for strict statutory construction, it is Plaintiff who ignores Section 3-102's plain language. The folly in her argument is that it conflates principles of duty and immunity. Plaintiff's alternative argument is equally flawed. Illinois law does not hold that an act or omission of repair by a municipality can never involve a discretionary policy determination. Rather, where the discretionary/ministerial analysis is concerned, each case is to be examined on its facts. On the instant record, the omissions complained of by Plaintiff relative to the City's investigation of and decision not to repair the sidewalk seam in question cannot be classified as ministerial. The Appellate Court's determination that Section 2-201 immunity bars Plaintiff's claims should be affirmed.

1. Strict statutory construction does not produce the result for which Plaintiff advocates.

Plaintiff claims that the prefatory language of Section 2-201 and Section 3-102 signals the Illinois legislature's intent for Section 3-102 to limit the availability of Section 2-201 immunity. She further avers that Section 3-102 grants immunity relative to acts or

omissions in the realm of maintaining public property in specific, narrow instances, none of which involve the making of discretionary policy determinations. As support for her argument, Plaintiff primarily clings to *Murray v. Chicago Youth Ctr.*, (2007), 224 Ill. 2d 213. She further invokes the rule that a specific immunity provision trumps a general immunity provision. Plaintiff is wrong. What Plaintiff fails to grasp is that Section 3-102 and 2-201 concern different, wholly unrelated topics. Her contention that Section 3-102 trumps Section 2-201 as a matter of statutory construction mixes apples with oranges (*i.e.*, duty with immunity and ministerial functions with discretionary functions).

Contrary to Plaintiff's intimations, the instant matter cannot be fairly characterized as one in which two of the Act's immunity provisions are in conflict. Section 3-102 does not bestow immunity. Even assuming, *arguendo*, Section 3-102 confers immunity that is all it does. It does not, as Plaintiff suggests, "otherwise provide" for liability within the meaning of the opening clause of Section 2-201. No provision of the Tort Immunity Act imposes liability. To that end, Section 1-101.1(a) of the Act, explicitly provides: "The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses." 745 ILCS 10/1-101.1(a); *see also Vessey v. Chicago Housing Auth.*, (1991), 145 Ill. 2d 404, 412 (noting the Act creates no duties or liabilities, but rather only confers immunity); *see also Bubb v. Springfield School Dist. 186*, (1995), 167 Ill. 2d 372, 378 (noting the Act grants only immunities and defenses). For this reason alone, Plaintiff's averment that based upon their predicate clauses, Section 2-201 is subordinate to Section 3-102 should be rejected outright.

Although part of the Act, Section 3-102 primarily codifies the common law duty of public entities to maintain their property in a reasonably safe condition. *Boub v. Twp. of Wayne*, (1995), 183 Ill. 2d 520, 524. It defines the scope of a local public entity's duty in that regard and simultaneously identifies situations in which the duty is inapplicable. Put another way, Section 3-102 "articulates the duty to which the subsequently delineated immunities in the Tort Immunity Act apply." *Lawson v. City of Chicago*, 278 Ill. App. 3d 628, 640 (1st Dist. 1996). Actual notice and constructive notice of an unreasonably dangerous condition by a public entity are not among the Act's subsequently delineated immunities, as Plaintiff contends. *See Greeson v. Mackinaw Tp.*, 207 Ill. App. 3d 193, 203 (3d Dist. 1990) (noting that "the 'subsequently delineated immunities' appear in the sections of the Act following Section 3–102"). Rather, actual or constructive notice, along with a plaintiff's status as an intended or permitted user (a subject that Plaintiff ignores), are conditions precedent (*i.e.*, defenses) to the imposition of a Section 3-102 duty.

Plaintiff's failure to recognize the important distinction between the existence of a duty and the application of immunity is precisely where her proffered strict statutory construction analysis goes horribly awry. Notably, Plaintiff acknowledged below that whether a local public entity owes a duty of care and whether that entity enjoys immunity are separate issues. (R. Vol. I, C 231). She has omitted discussing that subject in her submissions to this Court with good reason – it completely undercuts her strict statutory construction argument. The concepts of duty and immunity are different creatures, and each must be examined separately.

That Section 3-102 mainly codifies a duty renders it differ vastly from the Act's other provisions. That different terminology must be accorded some significance, meaning

or import. *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 581-582 (1st Dist. 2007) (holding that a court should not adopt a construction of a provision of the Act that renders the words or phrases used therein superfluous or meaningless). The City submits that the upshot of that difference in wording is that an alleged violation of Section 3-102's duty to maintain property can be subject to Section 2-201 discretionary immunity. Whether a local public entity owes a duty of care and whether that entity enjoys immunity are separate inquiries. *Arteman v. Clinton Community School Dist. No. 15*, (2002), 198 Ill. 2d 475, 480. Hence, Section 3-102 by its terms does not at all prevent immunity under Section 2-201. Even though a public entity may owe a duty of reasonable care to maintain its property, it can still be immune under Section 2-201 from liability for breaching that duty.

Illustrative of this point is *In re Chicago Flood Litigation*, (1997), 176 Ill. 2d 179. In that case, a freight tunnel running under downtown Chicago was breached during bridge construction that took place between May and September 1991. *Id.* at 184-185. A television crew inadvertently discovered the tunnel breach during filming in January 1992. *Id.* at 185. One month later, in February 1992, the television crew notified the city of the tunnel damage. *Id.* During March and early April 1992, city employees inspected the tunnel, photographed the damage and evaluated the necessity of repair work. *Id.* On April 13, 1992, the tunnel opened, and the Chicago River flooded it as well as buildings connected to it. *Id.* Approximately 200,000 people were evacuated from numerous Loop buildings and the Loop was declared a disaster area. *Id.*

A class of plaintiffs later sued the city for injury to property, lost revenues, profits and good will, lost wages, tips, and commissions, lost inventory, and expenses incurred in obtaining alternate lodging. *Id.* In particular, the plaintiffs alleged, among other claims,

that through negligence and willful conduct, the city failed to exercise ordinary care to maintain, repair and protect the tunnel both before and after the breach up to the time of the actual flood. *Id.* at 186. The city moved to dismiss that claim based upon an asserted Section 2-201 immunity defense. *Id.* at 187. The trial court denied the city's motion to dismiss as to the failure to repair theory in the negligence count and willful and wanton misconduct count of the class plaintiffs' complaint. *Id.* On appeal, the Appellate Court affirmed the trial court's ruling in that regard, holding that Section 2-201 of the Tort Immunity Act did not immunize the city for a failure to repair. *Id.* at 188.

On further appeal, this Court reversed the Appellate Court's aforesaid ruling. *Id.* at 196-197. In doing so, this Court determined that the city had made a discretionary policy determination and was entitled to immunity on plaintiffs' failure to repair claim. *Id.* at 197. Tellingly, the prefatory language of Section 3-102 and Section 2-201 played no role in this Court's ultimate decision in that regard, even though averments concerning the prefatory clause of Section 2-201 were presented to the Court. The same result should ensue here. *In re Chicago Flood Litigation* supports that in certain circumstances, the Tort Immunity Act can shield municipal employees and governments from liability for a failure to maintain a known unsafe condition. Plaintiff's strict statutory construction analysis fails to account for that case.

In addition to the difference between duty and immunity contributing to the conclusion that Section 3-102 does not supplant Section 2-201, there is also the fact that long-standing Illinois precedent holds that these two provisions cover incongruous subjects. *See Kennell v. Clayton Tp.*, 239 Ill. App. 3d 634, 639-40 (4th Dist. 1992) ("[T]here is simply no conflict between the provisions of section 3-102(a) and those of

section 2-109 and 2-201 of the Act."). To that end, Section 3-102 has been said to apply to ministerial duties, while Section 2-201 has been said to pertain to discretionary functions. *Id.*; *see also Greeson*, 207 Ill. App. 3d at 202-03; *see also Havens v. Harris Tp.*, 175 Ill. App. 3d 768, 770-71 (3d Dist. 1988). Under this approach as well, Section 3-102 cannot limit the immunity conferred by Section 2-201, as Plaintiff claims.

Plaintiff's only argument countering this analysis is that Section 3-102 makes no reference to ministerial or discretionary activities. (*See* Appellant's Br. at pp. 11, 24). However, that observation does not advance Plaintiff's cause. Her argument in that regard fails to account for and conflicts with that Illinois common law extended immunity to municipalities engaged in governmental functions, but held them liable for negligent performance of proprietary or ministerial functions, and that through the Act, the Illinois legislature sought to restore and codify those common law distinctions. *See Mora v. State*, (1977), 68 Ill. 2d 223, 234-35; *see also Lusietto v. Kingan*, 107 Ill. App. 2d 239, 244 (3d Dist. 1969). Since under common law, discretionary policy determinations about the maintenance and repair of public property were immunized, so too must it necessarily be where construction of the Tort Immunity Act is concerned, notwithstanding the omission of the terms "ministerial" or "discretionary" from Section 3-102. Under this analysis as well, Section 2-201 is in no way subservient to Section 3-102. Instead, Section 2-201 confers an immunity that can apply to the duty to maintain public property in a reasonably safe condition codified under Section 3-102, contrary to Plaintiff's intimations.

a. Plaintiff's attempt to avoid the application of Section 2-201 discretionary immunity to her claims is not sanctioned under *Murray*.

Murray offers Plaintiff no refuge. In that case, this Court addressed the interplay of Sections 3-108(a), 2-201 and 3-109 of the Act. *Murray*, 224 Ill. 2d at 224-26. Tellingly, Section 3-102 was nowhere discussed in *Murray*. For that reason alone, the Appellate Court's decision here does not run counter to *Murray*, nor is *Murray* "binding authority," as Plaintiff hastily proclaims. There, a minor plaintiff was rendered a quadriplegic after making a forward flip off a mini-trampoline and landing on his neck or shoulders during an extracurricular tumbling class at school. *Id.* at 216-17. The injured minor and his mother subsequently brought a negligence and willful and wanton action against the Chicago Board of Education ("the Board") and Chicago Youth Centers ("CYC"), the entities that respectively sponsored and conducted the class, as well as the CYC employee who served as the class instructor. *Id.* at 217-18. Among other allegations, the injured minor plaintiff and his mother contended that the Board, CYC and the CYC employee acted with utter indifference and conscious disregard for the minor plaintiff's safety by failing to supply appropriate protective equipment and a spotter and failing to warn him of the risk of spinal cord injury. *Id.*

The Board, CYC and the CYC employee separately moved for summary judgment, maintaining that the pleaded facts did not constitute willful and wanton conduct as a matter of law and/or that Section 2-201 and 3-108(a) immunity applied. *Id.* at 224-25. The trial court agreed with the defendants and awarded them summary judgment on those grounds. *Id.* In doing so, the trial court determined that Section 3-109 and its exception for alleged

willful and wanton conduct in the context of hazardous recreational activity did not override Sections 2-201 and 3-108(a). *Id.* at 225.

On appeal, the Appellate Court took a different approach, holding that Section 3-109 took precedence over Section 2-201 and 3-108(a) such that no immunity applied to the plaintiffs' willful and wanton misconduct claims. *Id.* However, the Appellate Court also determined that the record was devoid of sufficient evidence to maintain an action for willful and wanton conduct. *Id.* Hence, despite the different approach, the Board, CYC and the CYC employee still were not ultimately liable for the minor plaintiff's injuries. *Id.*

On further appeal, the plaintiffs' argument that Section 3-109 limited the availability of Section 2-201 and 3-108(a) immunity resonated with this Court. Noting that Section 3-108 begins with the predicate "except as otherwise provided in this Act" and that Section 2-201 states "except as otherwise provided by statute," this Court determined that Section 3-109(c)(2) provided an exemption to those provisions and meant that Section 3-108 and Section 2-201 immunity did not apply to the defendants' alleged willful and wanton behavior. *Id.* at 232-34. This Court further disagreed with the Appellate Court's assessment that the pleadings and facts adduced in discovery did not rise to the level of willful and wanton conduct. *Id.* at 244-46. As such, the summary judgment in the defendants' favor was reversed and the plaintiffs' willful and wanton claims were ultimately reinstated for a jury trial. *Id.* at 246.

For the reasons already noted, this case is not "on all fours" with *Murray*. *Murray* is arguably more significant for its honing the definition of willful and wanton misconduct than it is for any pronouncement regarding a limitation on Section 2-201 immunity. That point aside, the crux in *Murray* was that Section 2-201 and Section 3-108(a) provided

immunity for willful and wanton misconduct, but Section 3-109 contained a willful and wanton exception. *Murray* did not involve eliminating the application of Section 2-201 discretionary immunity altogether. Indeed, Section 2-201 and Section 3-108(a) immunity were still in play and barred the plaintiffs' negligence claims in that case.

All that happened in *Murray* was that the exception language for willful and wanton behavior from Section 3-109 of the Act got engrafted onto Section 2-201 and Section 3-108(a). Plaintiff cannot draw parallelisms between *Murray* and the instant case without again encountering an apples/oranges comparison problem. *Murray* was about placing limitations on Section 2-201 immunity where alleged willful and wanton behavior was concerned. The instant matter, in contrast, if Plaintiff has her way, concerns the complete annihilation of Section 2-201 immunity for claims that involve injury occurring in the use of public property.

Indeed, what Plaintiff purports to do here is something entirely different from what this Court sanctioned in *Murray*. Her end game is to wipe out Section 2-201 immunity entirely as concerns a whole category of claims. She wants Section 2-201 immunity to never apply to bar any claim involving an act or omission of maintenance or repair of municipal property. The Illinois legislature could not have intended such a result. Her aim in that regard flies in the face of this Court's acknowledgment that Section 2-201 discretionary immunity is "one of most significant protections afforded to local public entities and their employees under the Tort Immunity Act." *Arteman*, 198 Ill. 2d at 484. Furthermore, such a result does nothing to advance the Act's purpose "to protect local public entities and public employees from liability arising from the operation of government" and "prevent the dissipation of public funds through private damage awards."

See Village of Bloomingdale v. CDG Enterprises, Inc., (2001), 196 Ill. 2d 484, 490; *see also Bubb*, 167 Ill. 2d at 378.

Two of the Act's immunity provisions were in conflict in *Murray*, and given those circumstances, this Court held that Section 2-201 yielded to 3-109 only where immunity for the plaintiffs' willful and wanton claims were concerned. For the reasons noted above, that is not the scenario that confronts the Court here. Unlike in *Murray*, we are not dealing with equally applicable immunity provisions. Again, by its plain terms, Section 3-102 is not an immunity provision. Section 3-102 of the Act imposes a duty upon a public entity to exercise reasonable care to maintain its property.

The interplay between Sections 3-102 and 2-201 is not at all as Plaintiff would have it. Truth be told, there is no interplay amongst the two provisions whatsoever. They pertain to entirely different subject matters – one speaking to duty and the other addressing immunity. Against this backdrop, Plaintiff's proffered statutory construction analysis does not hold water. Additionally, Plaintiff's claim that Sections 2-201 and 2-109 do not apply because Section 3-102 supersedes them is deficient and does not comport with longstanding Illinois precedent holding that the ministerial/discretionary function distinction is contained in the Tort Immunity Act.

b. <u>The other cases on which Plaintiff relies to advocate for circumvention of Section 2-201 immunity are likewise distinguishable.</u>

Plaintiff fares no better with her reliance on *Horton v. City of Ottawa*, 40 Ill. App. 3d 544 (3d Dist. 1976), and *Courson v. Danville School District No. 118*, 333 Ill. App. 3d 86 (4th Dist. 2002), to assert that Section 3-102 overcomes the City's immunity under Section 2-201. In *Horton*, plaintiff James Horton ("Horton") was thrown from his

motorcycle after striking a large pothole in the City of Ottawa's ("Ottawa") street. *Horton*, 40 Ill. App. 3d at 546. Ottawa had placed gravel in the pothole, but the gravel repeatedly washed out when it rained. *Id.* at 548. The case proceeded to trial resulting in a jury verdict in the amount of $50,000 for Horton. *Id.* at 546. Ottawa filed a post-trial motion for a new trial on the issue of damages, which the trial court granted. *Id.* Horton, in turn, appealed that decision under Supreme Court Rule 306. *Id.* As part of Horton's appeal, Ottawa resurrected a Section 2-201 immunity defense that the trial court had rejected. *Id.*

On appeal, the Appellate Court affirmed the trial court's ruling relative to the inapplicability of Section 2-201 immunity. *Id.* at 547-48. In doing so, however, the Appellate Court did not engage in any discretionary/ministerial analysis. *Id.* Indeed, the decision in *Horton* is devoid of discussion concerning the evidence proffered by Ottawa, if any, to support that its handling of the pothole constituted a discretionary policy determination. *Id.* In that regard, the Appellate Court stopped short of where it needed to go, and its analysis was incomplete.

The foregoing point aside, the Appellate Court's decision relative to the inapplicability of Section 2-201 immunity ultimately hinged on that Section 3-105 of the Act expressly excluded injuries caused by weather conditions that resulted in physical damage to or deterioration of streets from immunity. *Id.* Since *Horton* concerned Section 3-105, it does not support Plaintiff's averment that Section 3-102 trumps Section 2-201. Indeed, Plaintiff is guilty of plucking a single passage from *Horton* while ignoring its context.

Furthermore, the bulk of the *Horton* decision dealt with the propriety of the trial court's disturbance of the jury's damages award, which the Appellate Court ultimately

reversed. *Id.* at 548-52. The case has been widely cited and relied upon for the Appellate Court's observations on that front, as opposed to the proposition for which Plaintiff endeavors to use it here. Additionally, *Horton* is antiquated. It was decided before Section 10/1-101.1(a) became part of the Act. 745 ILCS 10/1-101.1(a). Again, that provision reinforces that nothing in the Act imposes liability. *Id.* To reiterate, the City contends that provision, among other authority, undercuts Plaintiff's argument that Section 3-102 "otherwise provides" within the meaning of Section 2-201. Finally, *Horton* is of questionable authoritative status for the notion that the only immunities that can apply to a claim implicating Section 3-102 of the Act are those found in Article III given that there have been cases after *Horton* involving alleged deficient pothole repair work in which Section 2-201 discretionary immunity has been deemed applicable. *See, e.g., Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 395-96 (1st Dist. 2000).

Plaintiff's fixation on *Courson* is also all for naught. Plaintiff, with another pluck of a single sentence, argues that *Courson* stands for the proposition that Section 2-201 discretionary immunity cannot apply to a Section 3-102 claim. Plaintiff is wrong. In *Courson*, Daniel Courson ("Daniel"), an eighth-grade student, was injured while using a table saw during shop class. *Courson*, 333 Ill. App. 3d at 87. Daniel sued the school district, alleging it negligently failed to provide a shield or guard for the saw and failed to properly maintain the saw (*i.e.*, Count I). *Courson v. Danville School District No. 118*, 301 Ill. App. 3d 752, 754 (4th Dist. 1998). Daniel's complaint also asserted a claim for willful and wanton conduct against the school district (*i.e.*, Count II). *Id.* Among other things, Count II alleged that the school district failed to provide adequate supervision and failed to warn Daniel despite the school district's prior knowledge of the unsafe condition of the saw. *Id.*

The trial court dismissed Daniel's willful and wanton claims on the basis of Section 3-108(a) immunity. *Id.* The trial court granted the school district summary judgment on Daniel's negligence claims based on Section 2-201 discretionary immunity. *Courson*, 333 Ill. App. 3d at 87. Relative to the latter subject, the shop teacher testified at deposition that the saw's safety shield was not functioning properly, and it would catch on wood being pushed through the saw. *Id.* The teacher deemed the saw safer to operate without the shield. *Id.* He permanently removed the shield from the wood saw sometime before Daniel was injured. *Id.* The teacher also testified that he was given authority by the school district to operate the shop class in the manner he saw fit. *Id.* He did not contact any school official or the manufacturer of the saw before or after removing the safety shield. *Id.*

Daniel appealed the trial court's entry of summary judgment as concerned his negligence claims. *Id.* On appeal, the Appellate Court affirmed the trial court's granting of summary judgment to the school district, finding that the shop teacher's decision to remove the saw's safety shield was a discretionary policy determination within the ambit of Section 2-201 of the Act. *Id.* at 87-91. The Appellate Court also determined that the teacher's removal of the saw's safety shield could not be aptly characterized as a failure to maintain property. *Id.* at 92. Despite that holding, the Appellate Court mused about whether Section 3-102 could be a statutory exception to Section 2-201. *Id.* On that subject, the Appellate Court remarked: "[S]ection 3-102 imposes on a school district the duty to exercise reasonable care to maintain its property and . . . such duty does not fall within the immunity of section 2–201." *Id.*

The Appellate Court's above-quoted comment that Plaintiff seizes upon is *dicta*. *See People v. Sprinkle*, 4 Ill. App. 3d 6, 13 (3d Dist. 1972) (defining *dicta* as a remark or

opinion uttered as an aside for illustrative or suggestive purposes concerning some rule, principal or application of law that is not necessarily involved in a case or essential to its disposition). To that end, the statement was made by the Appellate Court in the penultimate paragraph of its opinion and without extensive discussion or analysis. *Courson*, 333 Ill. App. 3d at 87. It also bears mention that Daniel's case produced an earlier appeal (*i.e.*, *Courson I*) in which the Appellate Court similarly contemplated the relationship, if any, between Sections 3-102 and 2-201. *Courson*, 301 Ill. App. 3d at 758. In *Courson I*, the Appellate Court acknowledged that it did not have to reconcile Sections 3-102 and 2-201 since it was reversing the trial court's grant of summary judgment because of the school district's then failure to establish that the removal of the safety guard from the table saw was a discretionary policy determination. *Id.* In a similar vein, there was no reason for the Appellate Court in *Courson II* to ponder the interplay between Sections 3-102 and 2-201 when it had determined Daniel's claims did not implicate Section 3-102 in the first instance.

Furthermore, in *Courson I*, the Appellate Court observed that Section 3-102 codified a common law duty and that the existence of duty and the existence of immunity were separate issues. *Id.* Rather than supporting Plaintiff's argument, that observation on the part of the Appellate Court (which Plaintiff conveniently ignores) is in keeping with the City's proffered analysis herein. The difference between duty and immunity means that Section 3-102 cannot overcome and swallow up Section 2-201, as Plaintiff would have it. The bottom line is that Plaintiff makes more of the above-quoted single remark in *Courson II* than she should. Obviously, the Appellate Court thought as much when it (*i.e.*, the Court which decided *Courson*) readily cast that argument to the side.

c. The rule that a specific statutory provision prevails over a general provision is unavailing to Plaintiff's cause to avoid the application of Section 2-201 to her claims.

Plaintiff's reliance on the specific immunity provision trumps a general immunity rule is also misplaced. That framework does not guide the instant analysis. First, for the reasons already noted herein, this is not a case involving competing immunity provisions. Again, Section 3-102 is not an immunity provision. Rather, it merely codifies a duty owed by local public entities in the maintenance of their property. *See West v. Kirkum*, (1992), 147 Ill. 2d 1, 14. Further, even assuming, *arguendo*, Section 3-102 confers immunity, the notion that Section 3-102 more directly addresses the situation giving rise to Plaintiff's injury than does Section 2-201 is patently absurd.

An application of the "specific prevails over a general" rule of statutory construction occurred in *Murray* precisely because competing immunity provisions were in play in there. Parallelisms cannot be drawn between Section 3-102 and Section 3-109, try as Plaintiff might, to make the specific immunity provision trumps a general immunity rule applicable in this case. Indeed, with this argument, Plaintiff is trying to put a round peg in a square hole.

Section 3-102 does not speak with any particularity as to maintenance of sidewalks or circumstances in which liability may exist for the use of sidewalks like the way Section 3-109 classifies trampolining as a hazardous recreational activity. To that end, Section 3-102 is just as generic as Plaintiff professes Section 2-201 to be. *See Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 753 (1st Dist. 1991) ("Section 3-102(a) of the Tort Immunity Act sets forth a municipality's *general* property-related duty.") (emphasis added). Moreover, Section 3-102 can hardly be said to be precise and/or relate to only a

single subject matter for the purpose of employing the specific statutory provision prevails over a general provision rule, given its application in a vast array of factual contexts. *See Wagner v. City of Chicago*, (1995), 166 Ill. 2d 144 (applying Section 3-102 in the context of an automobile collision); *see also Wojdyla v. City of Park Ridge*, (1992), 148 Ill. 2d 417 (applying Section 3-102 in the context of alleged inadequate lighting conditions on public highways); *Nelson v. N.E. Illinois Reg'l Commuter R.R. Corp.*, 364 Ill. App. 3d 181 (1st Dist. 2006) (applying Section 3-102 in the context of injuries occurring in railyards as a result of the failure to maintain barrier fences). Simply stated, Section 3-102 is not a specific provision that carries the day for Plaintiff under the rule.

With her contention that the headings of Section 3-102 and Section 2-201 support that the former provision takes priority over the latter provision under the guise of the aforesaid rule, Plaintiff is really grasping at straws. The heading or title of a statute may be considered when construing it, but only if the heading or title provides guidance where its meaning is otherwise unclear. *Hansen v. Caring Professionals, Inc.*, 286 Ill. App. 3d 797, 805 (1st Dist. 1997). Plaintiff has not argued that the heading or title of the statutes would clarify an otherwise unclear meaning, and her reliance on the titles of the articles of the Act should be disregarded in its entirety.

Yet another folly in Plaintiff's argument is that the rule that a specific immunity provision trumps a general immunity provision cannot be employed to avoid the intent of the legislature or to avoid the application of an immunity provision validly raised by a defendant. *See Heinrich v. Libertyville High School*, (1998), 186 Ill. 2d 381, 390-91 (refusing to employ the rule when legislative intent can be discerned from the statutory language). To apply the rule in the manner for which Plaintiff advocates here to render

Section 2-201 meaningless for an entire category of claims defeats the legislative intent of the Tort Immunity Act. Much like her other averments, Plaintiff's invocation of the rule that a specific immunity provision trumps a general immunity provision gets her nowhere. Section 3-102 lacks the necessary specificity to establish priority over Section 2-201, as Plaintiff would have it. Section 3-102 is not any more direct or specific than is Section 2-201. In arguing to the contrary, it is once again Plaintiff who ignores what these provisions say.

d. *Richter* has broad application (including to the instant case) and was correctly decided.

Plaintiff's assault on *Richter v. College of DuPage*, 2013 IL App (2d) 130095, in conjunction with her strict statutory construction argument likewise misses the mark. Just as she has misread the Act, she misconstrues that case. Her myopic reading of *Richter* as hinging on a stipulation between the parties that Section 3–102 applies to ministerial functions and that Section 2–201 applies to exercises of discretion and policy determinations cannot be countenanced. Indeed, Plaintiff's contentions that a waiver of a gargantuan proportions occurred in *Richter* on a subject about which she is fighting in the instant case are much ado about nothing. Plaintiff is not fighting the proverbial "good fight" here.

In *Richter*, a pedestrian-student sued the College of DuPage ("the College") for damages stemming from a March 12, 2009 incident where she tripped on a deviation between two sidewalk slabs. *Id.* at ¶ 4. Among other arguments, the College asserted it was entitled to immunity under Section 2-201 of the Act. *Id.* at ¶ 6. The College moved for summary judgment based upon that immunity defense. *Id.* at ¶ 23. The evidence of record included deposition testimony from the College's benefits manager. That witness attested

to having notified the College's building and grounds department of the subject uneven sidewalk slab before the plaintiff's accident. *Id.* at ¶¶ 10-11. Further, the evidence of record included that the sidewalk deviation in question was marked with yellow paint at the time of the plaintiff's accident. *Id.* at ¶ 20. Finally, the College's risk management coordinator and various maintenance personnel testified that the College had three levels of approach relative to uneven concrete slabs. Upon receipt of a complaint, the College would either put out an orange cone and/or apply yellow paint in the area of the deviation. *Id.* at ¶ 12. Alternatively, the College would physically repair the sidewalk, which could include patching or grinding. *Id.*

The deposition testimony bore out that the third aforesaid approach was usually not undertaken during a three-or four-month season of freeze and thaw because even if repaired at that juncture, sidewalks slabs could continue to shift, and the College would be faced with the same trip hazard. *Id.* As such, during winter months, the College's general procedure was to flag a problematic concrete slab with a cone or paint to alert the public and thereafter watch the area until the weather broke and the slab could be physically altered. *Id.* However, the record evidence also included testimony from the manager of the College's building and grounds department to the effect that if a sidewalk deviation was abnormally dangerous, it was within his unfettered discretion to fix it in the winter, or alternatively, do nothing until the weather improved. *Id.* at ¶ 19. He drew upon his work history and experience in making that determination. *Id.*

The trial court determined that the College was entitled to discretionary immunity under Section 2-201 and granted its summary judgment motion. *Id.* at ¶ 25. The trial court found that the College's handling of the subject sidewalk deviation, and specifically, the

College's choice to hold off physically altering the sidewalk until wintry weather passed, was both an exercise of discretion and a policy determination, as opposed to a ministerial act. *Id.* On appeal, the Appellate Court affirmed the trial court's summary judgment ruling in the College's favor. In doing so, the Appellate Court surveyed the existing case law construing Section 2-201 of the Tort Immunity Act and distinguished the circumstances before it from cases in which repair acts or omissions had been classified as ministerial. *Id.* at ¶¶ 40-50. Relevant to the Appellate Court's Section 2-201 analysis was the fact that the manager of the College's building and grounds department assessed each sidewalk situation individually before determining how best to proceed. *Id.* at ¶¶ 44-45. The Appellate Court further highlighted that there were no set of rules or regulations that the College's building and grounds department manager was required to follow relative to the handling of sidewalk repairs. *Id.*

The so-called stipulation in *Richter* with which Plaintiff is obsessed happened to be a correct statement of Illinois law with which the trial court and the Appellate Court obviously agreed. Again, the purported agreement by the parties is rooted in *Kennell v. Clayton Tp.*, 239 Ill. App. 3d 634 (4th Dist. 1992), among other authorities, discussed herein. Plaintiff's stubborn refusal to recognize that Sections 3-102 and 2-201 of the Act cover different, incongruous subjects does not render *Richter* of limited utility, as she hastily proclaims. Absolutely nothing within the *Richter* decision suggests that it was a limited holding. The stipulation on which Plaintiff seizes accounts for merely a single sentence in the *Richter* opinion.

Additionally, contrary to Plaintiff's assertions, the language of Sections 3-102 and 2-201 was noted in the *Richter* decision. No critical assumptions were made by the

Appellate Court in *Richter* that render the analysis therein useless here. Finally, that this Court denied a petition for leave to appeal in *Richter* signaled approval of the Appellate Court's decision. *See Corbett v. Devon Bank*, 12 Ill. App. 3d 559, 567 (1st Dist. 1973) ("The proper principle to be applied here is that denial by the Supreme Court of a petition for leave to appeal from a decision of the Appellate Court of Illinois is an approval of the decision, or of the result reached, although not necessarily an approval of the reasons expressed by the appellate court."). *Richter* is not deserving of narrow application, as Plaintiff contends. It is outcome determinative of this case, as further discussed below.

2. <u>The discretionary/ministerial analysis also does not produce the result for which Plaintiff advocates.</u>

The allegations in Plaintiff's complaint relate to the City's purported failure to repair an unreasonably dangerous condition in a sidewalk namely, an uneven juncture of two concrete slabs. Plaintiff contends that her claims arise from the City's ministerial – and not discretionary – failure to maintain its property. For that alternative argument, she once again relies on Section 3-102 of the Tort Immunity Act. In addition to (confusingly) repeating her statutory construction argument *ad nauseum*, Plaintiff further advocates for a rule of law to the effect that an act or omission of repair by a municipality can never involve a discretionary policy determination. She is wrong. *See Robinson v. Washington Township*, 2012 IL App (3d) 110177, ¶ 26 (Holdridge, J., dissenting) (emphasizing that there is no rule of law that repair work, or the lack thereof, is always ministerial). The discretionary/ministerial analysis is not rigid, as Plaintiff has presented it. *See Anderson v. Alberto–Culver USA, Inc.*, 317 Ill. App. 3d 1104, 1113 (1st Dist. 2000) ("The distinction between discretionary and ministerial functions resists precise formulation."). Indeed, Plaintiff mischaracterizes the state of Illinois law on the subject of Section 2-201 immunity

as applied to an act or omission of repair in her Appellant's brief and imports that misunderstanding into her argument.

This Court has held that whether a municipality engages in a program of public improvement is a discretionary matter, but the manner in which the municipality implements the program is not. *Greene v. City of Chicago*, (1978), 73 Ill. 2d 100, 108; *see also Baran v. City of Chicago Heights*, (1969), 43 Ill. 2d 177, 180-81. Some courts have interpreted this Court's holdings in that regard to mean that as a general rule, Section 2-201 discretionary immunity should not extend to a municipality's execution of planned maintenance and repair work. *See, e.g., Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 806 (1st Dist. 2008). Those courts have rejected a reading of Section 2-201 that would essentially "grant discretionary immunity to every act performed by a public employee." *See, e.g., Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 627 (1st Dist. 2010).

However, because the Section 2-201 immunity evaluation is inexact and conducted on a case-by-case basis, there are cases in which courts have applied Section 2-201 immunity to a municipality's act or omission of repair. *See, e.g., In re Chicago Flood Litigation*, (1997), 176 Ill. 2d 179; *see also Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994; *see also Wrobel*, 318 Ill. App. 3d at 396. The varying results in the Section 2-201 immunity realm where municipal repair and maintenance issues are concerned are rooted in that the analysis of Section 2-201 discretionary immunity is fact-driven. *Snyder v. Curran Township*, (1995), 167 Ill. 2d 466, 474. The point not to be lost on this Court is that to apply Section 2-201 immunity in this case would not result in an overly expansive interpretation of the Tort Immunity Act, as Plaintiff proclaims. On the instant record, the omissions complained of by Plaintiff relative to the City's investigation

of and decision not to undertake repair of the sidewalk slabs in question cannot be classified as ministerial.

Section 2-201 of the Tort Immunity Act confers immunity from liability to local government employees for their performance of discretionary functions. *Id.* at 468. Section 2-201 immunity extends to public entities by virtue of Section 2-109 of the Tort Immunity Act. *Collins v. Bartlett Park Dist.*, 2013 IL App (2d) 130006, ¶ 58. Section 2-201 protects against liability for negligence and willful and wanton misconduct alike. *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶ 22. Actions that are ministerial, however, receive no protection under Section 2-201. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (1st Dist. 2002).

The Section 2-201 immunity analysis is two-fold. Immunity under Section 2-201 is dependent upon both the type of position held by the employee whose conduct has come under scrutiny and the exact nature of the acts carried out or omitted by the employee about which a plaintiff complains. *Courson*, 333 Ill. App. 3d at 88. First, an employee (and by extension, a municipality) may qualify for discretionary immunity if he holds either a position involving the determination of policy or a position involving the exercise of discretion. *Harinek v. 161 North Clark Street Ltd. Partnership*, (1998), 181 Ill. 2d 335, 341. Generally speaking, the higher an employee's position in the relevant chain of command, the more likely it is that the position involves the determination of policy or exercise of discretion. *Id.* at 342-343. Rank and hierarchy aside, the relevant inquiry is whether personal judgment is needed to execute the duties assigned to the employee's position. *Wrobel*, 318 Ill. App. 3d at 395.

The second prong of the Section 2-201 immunity analysis concerns whether the tort claim at issue involves a discretionary policy determination. *Courson,* 333 Ill. App. 3d at 88. Policy decisions are assessments that require the municipality "to balance competing interests and to make a judgment call as to what course of action will best serve each of those interests." *Harinek,* 181 Ill. 2d at 342. Discretionary acts are those unique to public office and involve the "exercise of personal judgment and deliberation in deciding whether to perform a certain act or in what manner the act should be conducted." *Wrobel*, 318 Ill. App. 3d at 394-395. In contrast, ministerial tasks "are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Snyder*, 167 Ill. 2d at 474.

Here, there is no dispute that Ahrens is a high-ranking official who uses personal judgment in the exercise of his duties. Again, Ahrens was the City's director of public works at the time of Plaintiff's accident. (R. Vol. I, C 185, at 6:14-22). Hence, the employee position prong of the Section 2-201 analysis is undoubtedly satisfied. The crucial question where the City's Section 2-201 immunity defense is concerned is whether Plaintiff's claim implicates a discretionary policy determination by the City. For the reasons discussed herein, that inquiry should be answered in the affirmative.

The same circumstances that compelled the reviewing courts in *In re Chicago Flood Litigation*, *Wrobel* and *Richter* to declare the act of and/or failure to repair to be a discretionary policy determination exist here. In this case, Ahrens decided which sidewalk slabs would be repaired as part of the North Vermilion sidewalk repair project based upon several factors including, but not limited to, budget, available manpower and the proximity

of the slab to other obstructions such as buildings, light poles and trees. (R. Vol. I, C 187, at 15:1-24, 16:1-15; C188, at 17:4-12; C 202, at 76:8-22). Relative to the last aforesaid factor, Ahrens explained that the presence of such barriers typically resulted in less pedestrian traffic in those areas. (R. Vol. I, C 202, at 76:8-22). Hence, the thought process behind not prioritizing the sidewalk juncture in question for repair and/or replacement was that it was less likely that a pedestrian would encounter it. (R. Vol. I, C 202, at 76:8-22). Further, per Ahrens, judgment calls about how best to allocate resources and prioritize repairs were made. (R. Vol. I, C 202, at 74:4-7). In the end, Ahrens balanced competing interests and the sidewalk slabs in question were passed over for repair and/or replacement. That is a quintessential policy decision.

Further, the testimony of record conclusively establishes that Ahrens, along with his colleagues namely, Lawson and Cohen, collectively and freely deliberated over which sidewalk slabs should be repaired. Ahren's final determination in that regard was not exercised in formulaic fashion or subject to a rigid set of criteria. No evidence has been introduced to the effect that statutory or regulatory guidelines definitively prescribed how Ahrens should have approached and/or prioritized the subject repair work. In fact, Ahrens testified that there were no City policies or procedures related to sidewalk repairs. (R. Vol. I, C 191, at 32:4-9). Accordingly, Ahrens also engaged in a protected act of discretion.

Plaintiff pays mere lip service to the discretionary/ministerial analysis. Tellingly, she does not endeavor to engage in such an analysis in her Appellant's brief. Save for her Statement of Facts, she completely avoids discussing the evidence in this case. She does so with good reason. The decision the City (via Ahrens) made not to repair the subject

sidewalk deviation was discretionary, unique to a particular public office, and is entitled to immunity.

II. SUMMARY JUDGMENT IN THE CITY'S FAVOR IS WARRANTED BECAUSE THE EVIDENCE OF RECORD ESTABLISHES THE HEIGHT DIFFERENTIAL AMID THE ADJOINING SLABS OF CONCRETE AS BEING BETWEEN ONE INCH AND ONE AND ONE HALF INCHES AND THERE ARE NO AGGRAVATING CIRCUMSTANCES PREVENTING THE APPLICATION OF THE *DE MINIMIS* RULE.

Under Illinois law, where no aggravating factors exist, a vertical displacement of less than two (2) inches is *de minimis*. *See Warner v. City of Chicago*, (1978), 72 Ill. 2d 100, 104-05 (a variation of only one and one half inches, absent more, is *de minimis*); *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 121-22 (4th Dist. 1993) (after balancing the burden on the city to inspect or repair many miles of residential sidewalk with the foreseeability of harm to result from the defect described in the case, a one and seven-eighths inch difference in levels of two concrete slabs of a sidewalk constituted a *de minimis*, non-actionable defect); *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 202-03 (2d Dist. 2003) (a one inch displacement between a ramp and gutter was *de minimis* and no circumstances existed to exclude the ramp from the *de minimis* rule). The facts of record compel the application of the *de minimis* rule in this case.

The photographs of the uneven sidewalk seam in question that are part of the record before the Court depict a height differential amid the adjoining slabs of concrete of between one inch and one and one half inches. (R. Vol. I, C 187, 214-215, 222). Ahrens testified that the difference in levels of the concrete slabs in question was less than two inches. (R. Vol. I, C 188, at 17:8-15). Plaintiff herself testified that on the day of her accident water from rain earlier that day had puddled at the point of the uneven sidewalk seam to a depth of one inch. (R. Vol. I, C 145, at 72:2-4). That Plaintiff's accident occurred in the City's

downtown commercial district does not except the subject sections of the sidewalk from application of the *de minimis* rule. That fact, without more, does not constitute an aggravating factor to bar the application of the *de minimis* rule.

Nothing about the commercial nature of Plaintiff's surroundings impacted her actions leading up to the accident. Plaintiff testified that she was leisurely walking to her car, had no plans for additional travel, was not in any rush and was aware of her surroundings when the accident occurred. (R. Vol. I, C 146, at 74:6-12). At the time of her accident, Plaintiff was looking directly in front of her. (R. Vol. I, C 144, at 69:6-9). She was not distracted. (R. Vol. I, C 144, at 67:1-8; C 146, at 74:6-12). There was no vehicular or pedestrian traffic in Plaintiff's immediate vicinity when she tripped and fell. (R. Vol. I, C 152, at 100:1-8). By Plaintiff's own account, the area in which her accident occurred, notwithstanding the presence of storefronts, is not thriving. (R. Vol. I, C 159, at 127:1-3). Based upon the foregoing evidence, the sidewalk seam is a non-actionable irregularity. On this alternative basis, summary judgment in the City's favor is warranted.

CONCLUSION

WHEREFORE, Defendant-Appellee, CITY OF DANVILLE, by and through its attorneys, respectfully prays that this Court affirm the Appellate Court's opinion dated June 15, 2017, and grant any additional relief that this Court deems just, equitable and appropriate in the premises.

Respectfully submitted this 22nd day of January, 2018

/s/ Jennifer L. Turiello
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No. 122486

IN THE SUPREME COURT OF ILLINOIS

BARBARA MONSON,	)	**On Appeal from the Decision of**
	)	**the Appellate Court of Illinois,**
Plaintiff/Appellant,	)	**Fourth Judicial District**
	)	
v.	)	**No. 4-16-0593**
	)	
CITY OF DANVILLE, a Home Rule Municipality,	)	**There heard on appeal from the**
	)	**Court of the Fifth Judicial Circuit,**
	)	**Vermilion County, Illinois**
Defendant/Appellee.	)	
	)	**No. 13 L 71**
	)	
	)	**Honorable Nancy S. Fahey**
	)	**Judge Presiding**

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statements of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a) is 50 pages.

Respectfully submitted this 22nd day of January, 2018,

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No. 122486

IN THE SUPREME COURT OF ILLINOIS

BARBARA MONSON,	)	**On Appeal from the Decision of the**
	)	**Appellate Court of Illinois, Fourth**
Plaintiff/Appellant,	)	**Judicial District**
	)	
v.	)	**No. 4-16-0593**
	)	
CITY OF DANVILLE, a Home Rule municipality,	)	**There heard on appeal from the Circuit**
	)	**Court of the Fifth Judicial Circuit,**
	)	**Vermilion County, Illinois**
Defendant/Appellee.	)	
	)	**No. 13 L 71**
	)	
	)	**Honorable Nancy S. Fahey**
	)	**Judge Presiding**

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PLEASE TAKE NOTICE that on the 22nd day of January 2018, the undersigned caused to be electronically filed with the Office of the Clerk of the Illinois Supreme Court, the following:

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CERTIFICATE OF SERVICE

I, the undersigned, under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, certify that the statements set forth in this instrument are true. On the 22nd day of January, 2018, I served a copy of the NOTICE OF FILING and BRIEF AND ARGUMENT OF DEFENDANT/APPELLEE CITY OF DANVILLE by electronically mailing the same to: Miranda L. Soucie (msoucie@spiroslaw.com), Spiros Law, P.C., 2807 N. Vermilion, Ste. 3, Danville, IL 61832; Scott D. McKenna (smckenna@bestfirm.com), Best Vanderlaan & Harrington, 25 E. Washington St., Suite 800, Chicago, IL 60602; Scott B. Dolezal (sdolezal@bestfirm.com), Best Vanderlaan & Harrington, 25 E. Washington St., Suite 800, Chicago, IL 60602; and Stephen Blecha (SBLECHA@COPLANCRANE.COM), Coplan & Crane, Ltd., 1111 Westgate St. #101, Oak Park, IL 60301.

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